



FEDERAL ELECTION COMMISSION
Washington, DC 20463

NOV - 3 2009

Charles R. Spies, Esq.
McKenna Long & Aldridge, LLP
1900 K Street NW
Washington, DC 20006-1108

RE: MUR 6190
Kelly Bearden, Norman R. Byrne
Rosemary Byrne, Byrne Electrical, Inc.
Daniel P. Byrne, Katherine Scudder
Molly M. Nowak

Dear Mr. Spies:

On May 13, 2009, the Federal Election Commission notified your clients, Kelly Bearden, Norman R. Byrne, Rosemary Byrne, Byrne Electrical, Inc., Daniel P. Byrne, Katherine Scudder, and Molly M. Nowak of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

Upon further review of the allegations contained in the complaint, and the information provided by your clients, the Commission, on October 20, 2009 voted to dismiss the allegation that Kelly Bearden made a contribution in Complainant's name in violation of 2 U.S.C. §§ 441f and 441a(a)(1)(A). In addition, the Commission found that there is no reason to believe that Kelly Bearden, Norman R. Byrne, Rosemary Byrne, Byrne Electrical, Inc., Daniel P. Byrne, Katherine Scudder, or Molly M. Nowak violated 2 U.S.C. § 441f in connection with the allegation that Norman R. Byrne reimbursed contributions. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

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If you have any questions, please contact Shana M. Broussard, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen". The signature is fluid and cursive, with the first name "Mark" and last name "Allen" clearly distinguishable.

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENTS:** Kelly B. Bearden MUR 6190
6 Norinan R. Byrne
7 Rosemary Byrne
8 Byrne Electrical, Inc.
9 Daniel P. Byrne
10 Katherine Scudder
11 Molly M. Nowak
12

13
14 **I. GENERATION OF MATTER**

15
16 This matter was generated by a Complaint filed with the Federal Election
17 Commission ("the Commission") by David W. Bearden. *See* 2 U.S.C. § 437g(a)(1).

18 **II. INTRODUCTION**

19
20 Complainant alleges that Kelly Bearden, his estranged spouse, violated the
21 Federal Election Campaign Act of 1971, as amended ("the Act") when she made a
22 contribution in the amount of \$2,000 in his name to John McCain, 2008, Inc., ("the
23 Committee" or "McCain Committee") the authorized committee of presidential candidate
24 John McCain. Complainant alleges that the contribution was made by a check drawn on
25 the couple's joint account without his knowledge or approval. The Complaint also
26 alleges that in June of 2008, Kelly Bearden told the Complainant that her father, Norman
27 Byrne, had directed family members and "some employees\ officers" of Byrne Electrical,
28 Inc. to contribute to the McCain campaign and that Norman Byrne reimbursed those
29 contributions. Complaint at 2.

30 Respondents deny the allegations. They assert the Complaint is motivated by the
31 contentious divorce proceedings between the Complainant and Respondent Kelly
32 Bearden. Bearden acknowledges making a contribution from the couple's joint account;

1 however, she asserts that the contribution was made with personal funds and was not
2 reimbursed by Norman Byrne or any other person. All Respondents assert that the
3 allegations in the Complaint are speculative and lack factual support, and they seek
4 dismissal of the Complaint.

5 Based upon the Complaint, the Responses, and other available information, the
6 Commission finds no reason to believe that Respondents violated 2 U.S.C. § 441f and
7 closes the file in this matter.

8 **III. FACTUAL AND LEGAL ANALYSIS**

9 **A. Factual Background**

10 Complainant received a letter dated September 4, 2008, from the McCain
11 Committee that thanked him for his contribution and sought to obtain the Complainant's
12 occupation and employer information.¹ Complaint Exhibit B. The letter did not specify
13 the date, amount, or circumstances of the Complainant's contribution. The Complaint
14 suggests that this September 4 correspondence was the Complainant's initial notice that a
15 contribution had been made in his name to the Committee. Complainant asserts that this
16 contribution was made without his knowledge or approval and that his access to the joint
17 account, from which the contribution was made, was limited to ATM and credit card
18 transactions. Complaint at 1. Complainant asserts that contributing to any political
19 candidate violates his personal beliefs, and in March of 2008, Kelly Bearden had
20 "represented to [him] that the household was under severe financial distress." *Id.* at 2.

¹ The September 4 letter was addressed to the Complainant at [redacted] Grand Rapids, MI. The Committee's 2008 April Quarterly Report reflects an address for the Complainant of [redacted] Ada, MI. This latter address is Bearden's current address and appears to be the former marital residence of Complainant and Bearden. See Bearden Response, Exhibit 1 at 1, 2; see also Bearden Affidavit at 1. Neither the Complainant nor Bearden provide information as to how the Committee obtained Complainant's subsequent address.

1 Complainant also alleges that in June of 2008, Bearden told him that Norman
2 Byrne "reimbursed her, all direct family members and some employees\ officers of Byrne
3 Industrial Specialists Incorporated that made similar contributions to the McCain
4 campaign at Mr. Byrne's direction because Mr. and Mrs. Byrne had reached the lawful
5 financial limit." Complaint at 2. In support of this allegation, Complainant provided a
6 chart listing contributions made by Byrne family members to the McCain Committee by
7 date and amount, indicating contributions from several Byrne family members on the
8 same day on three occasions during 2007-2008. *See* Complaint Exhibit C.

9 According to Bearden's Response, in February of 2008, she made a contribution
10 to the McCain Committee with a check drawn on the joint account she and the
11 Complainant maintained. The names of both the Complainant and Bearden were
12 imprinted on the check, and each had access to the account funds. Bearden Response at
13 2-4. The couple's monthly account statement shows that check number 8682 in the
14 amount of \$2,300 was paid on March 11, 2008. *See* Complaint Exhibit A. Bearden
15 asserts that this contribution was intended as a joint contribution to the McCain
16 Committee, and, in fact, the Complainant "not only enthusiastically attended the [related]
17 fundraiser for Sen. McCain but also got his picture taken with Sen. McCain and proudly
18 displayed said photograph in a prominent location in his living room." Bearden
19 Response at 3; *see also* Bearden Affidavit at 2. Bearden claims that "Complainant now
20 wishes to rescind his portion of a joint-contribution that was made with his wife, which
21 he is now -- more than a year after the fact -- claiming that he didn't authorize or
22 support." Bearden Response at 2. Bearden also asserts that the contribution to the
23 McCain Committee is consistent with other contributions that the couple made jointly to

political and charitable organizations. Bearden Response at 3; *see also* Bearden Exhibit 1.² Only Bearden signed the check and forwarded the contribution to the McCain Committee. *Id.* at 4.

All Respondents assert that the timing and filing of the Complaint is motivated by the contentious divorce proceedings between the Complainant and Kelly Bearden and specifically deny the allegations of the Complaint. Respondents also provided sworn affidavits attesting that they have previously made contributions to candidates on the state and federal levels, all their contributions were made with personal funds, and neither Norman Byrne nor any other individual or entity reimbursed them for their contributions to the McCain Committee. *See* Affidavits of Norman Byrne, Daniel Byrne, Molly Nowak, Katherine Scudder, and Kelly Bearden.

B. Analysis

1. Spousal Reimbursement Allegation

The Act limits an individual's contributions to a candidate or his authorized committee to an aggregate of \$2,300 per election for the 2008 election cycle. 2 U.S.C. § 441a(a)(1)(A). The Act also prohibits contributions made in the name of another. 2 U.S.C. § 441f.³ Further, no person shall knowingly permit his or her name to

² Exhibit 1 consists of three letters dated October 23, 2006, January 24, 2007, and February 2, 2007, reflecting joint charitable donations made by Complainant and Kelly Bearden. None of the three donations were to state or federal political candidates or parties.

³ On June 8, 2009, the federal district court in the Central District of California dismissed two counts of a criminal indictment wherein the federal government alleged that Pierce O'Donnell violated 2 U.S.C. § 441f by reimbursing conduit contributions to the 2004 presidential campaign of Sen. John Edwards. The district court ruled in part that section 441f did not apply to indirect contributions made through a conduit or intermediary. The U.S. Department of Justice filed a notice of appeal to the Ninth Circuit. *U.S. v. O'Donnell*, C.D. Cal. No. 08-872, *appeal docketed*, No. 90-567 (9th Cir. June 16, 2009). The conduct in the O'Donnell matter occurred in the 9th Circuit. The alleged activity in MUR 6190 took place in the 7th Circuit. Excluding the O'Donnell dismissal, numerous federal district courts in the Second, Third, Fourth,

1 be used to make such a contribution or knowingly accept a contribution made by one
2 person in the name of another. *Id.* Examples of contributions in the name of another
3 include:

- 4 (i) giving money or anything of value, all or part of which was provided to
5 the contributor by another person (the true contributor) without disclosing
6 the source of money or the thing of value to the recipient candidate or
7 committee at the time the contribution is made, or
- 8 (ii) making a contribution of money or anything of value and attributing as the
9 source of the money or thing of value another person when in fact the
10 contributor is the source.

11 11 C.F.R. § 110.4(b)(2)(i)-(ii).

12 Complainant alleges that Kelly Bearden made the March 11, 2008, contribution in
13 the amount of \$2,000 to the McCain Committee in his name and thus violated the Act.
14 *See* 2 U.S.C. § 441f. Bearden denies the allegation. According to her Response, she and
15 the Complainant both intended to make the contribution. However, only she signed the
16 \$2,300 check to the McCain Committee. According to the Committee's disclosure
17 reports, Bearden had previously contributed \$1,000 to the Committee on July 27, 2007,
18 and \$1,000 on January 22, 2008. These contributions were designated for the primary
19 election. Another \$2,300 from Bearden on March 11, 2008, would bring her aggregate
20 contribution to \$4,300 for the primary and would have resulted in an excessive
21 contribution to the McCain Committee. *See* 2 U.S.C. § 441a(a)(1)(A).

22 Pursuant to the Commission's regulations, committee treasurers are responsible
23 for ascertaining whether contributions received, when aggregated with other
24 contributions from the same contributor, exceed the contribution limitations. 11 C.F.R.
25 § 103.3(b). If a treasurer determines that a contribution exceeds the contribution

Ninth, Tenth, and Eleventh Circuits have found violations of section 441f for reimbursing conduit contributions.

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1 limitations, the treasurer has sixty (60) days to refund the excessive contribution, or
2 obtain a written redesignation or reattribution of the excessive portion. 11 C.F.R.
3 § 103.3(b)(3). If the committee receives an excessive contribution made by a written
4 instrument imprinted with the name of more than one individual, yet signed by only one
5 individual, Commission regulations allow for presumptive reattribution of the excessive
6 portion to the other individual who did not sign a joint instrument, provided it does not
7 result in an excessive contribution for any contributor. 11 C.F.R. § 110.1(k)(3)(ii)(B)(1).
8 The committee must notify each contributor of this action within 60 days of the receipt of
9 the contribution and must offer the contributor the option to receive a refund. 11 C.F.R.
10 § 110.1(k)(3)(ii)(B)(2)-(3).

11 Bearden acknowledged that the Complainant did not sign the \$2,300 check for the
12 March 11, 2008, contribution. *See* Bearden Response at 4. The Committee's 2008 April
13 Quarterly Report memo entry for the March 11, 2008, contribution from Bearden states
14 "reattribution to spouse." The available information suggests that upon receipt of the
15 \$2,300 contribution from Bearden on March 11, 2008, the McCain Committee
16 reattributed the \$2,000 excessive portion to the Complainant, whose name was also
17 imprinted on the check.⁴ Neither the Complainant nor Bearden provided information one
18 way or the other as to whether the McCain Committee notified either individual of the
19 excessive contribution and offered a refund. *See* 11 C.F.R. § 110.1(k)(3)(ii)(B)(2)-(3).
20 Subsequently, the Committee forwarded the September 4, 2008, letter to the Complainant
21 requesting occupation and employer information in connection with his contribution.
22 Thus, Kelly Bearden may not have made a prohibited contribution in the name of

⁴ The Complaint and Bearden's Response both recognize this process. *See* Complaint at 1 and Bearden Response at 4.

another, but rather may have made an excessive contribution to the McCain Committee that was reattributed to the Complainant. *See* 2 U.S.C. § 441a(a)(1)(A); 11 C.F.R. § 110.1(k)(3). In view of the circumstances surrounding Kelly Bearden's contributions to the Committee, the Commission, in an exercise of its prosecutorial discretion, dismisses the allegation that she made a contribution in Complainant's name in violation of 2 U.S.C. §§ 441f and 441a(a)(1)(A). *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

2. Family Reimbursement Allegation

Complainant also alleges that Norman Byrne reimbursed contributions to the McCain Committee made by "family members and some employees\ officers" of Byrne Electrical, Inc. Complainant alleges that Kelly Bearden told him of these reimbursements "on or around June 2008...." Complaint at 2. Complainant also provided a chart listing family member contributions to the McCain Committee indicating multiple family member contributions on the same day on three occasions. Complaint Exhibit C.

Respondent Norman Byrne denies by affidavit that he ever reimbursed, directly or indirectly, contributions made by any family member or individual affiliated with Byrne Electrical, Inc. Norman Byrne Affidavit at 1-2. Kelly Bearden, Daniel Byrne, Molly Nowak, and Katherine Scudder similarly deny by affidavits that they received funds for their contributions from Norman Byrne or any other source.⁵ Respondents aver that they have a personal history of making contributions with their personal funds to political

⁵ Respondents Rosemary Byrne and Byrne Electrical, Inc. filed short responses seeking dismissal of the Complaint because it fails to allege any action taken by either respondent that would constitute a violation of the Act. In Rosemary Byrne's Response, she notes the Complaint's sole reference to her is the following sentence, "On or around June 2008 Kelly Bearden stated to me that she made contributions to the McCain campaign at her father Norman Byrne's request because he and his wife Rosemary Byrne had already reached the legal limit." Rosemary Byrne Response at 1. Similarly, Byrne Electrical, Inc.'s Response also notes that the Complaint fails to allege any specific violations by the corporation, and asserts that even if Norman Byrne had reimbursed political contributions made by his family members, that would constitute a violation of the Act by Mr. Byrne, not Byrne Electrical. Byrne Electrical, Inc. Response at 1-2.

1 candidates on the state and federal level as well as to charitable organizations. *See*
2 Affidavits of Norman Byrne, Daniel Byrne, Molly Nowak, Katherine Scudder and Kelly
3 Bearden.⁶

4 Further, Kelly Bearden specifically denies that she informed the Complainant that
5 Norman Byrne requested that she and her siblings contribute to the McCain campaign.
6 Bearden Affidavit at 2. In her response, Bearden asserts that as a result of the contentious
7 and on-going divorce proceedings between her and the Complainant, as of May of 2008,
8 the primary means for communication between the two was through counsel. Bearden
9 Response at 2. Bearden declares in her affidavit that she did not discuss the political
10 contributions of her father or other family members with the Complainant. *See* Bearden
11 Affidavit at 2.

12 Considering that the allegation is limited to a single alleged statement by Kelly
13 Bearden supported only by the Complainant's list of Respondents' contributions to the
14 McCain Committee, there does not appear to be a sufficient basis to open an investigation
15 in this matter. Although there are similarities in the dates and amounts of Respondents'
16 contributions, this information is insufficient to support the Complainant's allegation that
17 Norman Byrne reimbursed Kelly Bearden, Daniel Byrne, Katherine Scudder and Molly
18 Nowak for contributions they made to the McCain Committee. Accordingly, the
19 Commission finds no reason to believe that Kelly B. Bearden, Norman R. Byrne,
20 Rosemary Byrne, Byrne Electrical Inc., Daniel P. Byrne, Katherine Scudder, or Molly M.
21 Nowak violated 2 U.S.C. § 441f and closes the file in this matter.

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⁶ However, the Commission's database does not indicate any previous contributions to federal committees by Kelly Bearden, Katherine Scudder, or Molly Nowak.